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Yap You Jee v Public Prosecutor and other appeals

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS J-09–112–04 OF 2012, J-09–111–04 OF 2012 AND J-09–117–04 OF 2012
RAUS SHARIF PCA, MOHTARUDIN BAKI AND TENGKU MAIMUN JJCA
15 JUNE 2015

C

Criminal Procedure — Charge — Amendment — Whether amendment to charges at close of prosecution's case prejudiced accused — Whether trial judge required to give grounds of judgment in finding prima facie case had been proved — Whether correct inferences made from the evidence that accused persons had common intention to commit the crime — Whether statement recorded from witness under s 112 of the Criminal Procedure Code properly admitted in evidence as police took reasonable steps to secure his attendance but in vain — Whether no good reason shown why trial court's decision on convictions and sentences should be disturbed — Evidence Act 1950, s 32

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The appellants in the three appeals herein were convicted and sentenced to varying jail terms by the sessions court for cheating a businessman ('SP1') who wanted to buy land for investment. The appellants devised a scheme to convince SP1 he was buying two plots of land belonging to a state government and that he had to pay huge sums of money to make it possible. An individual named Raizul bin Manap ('Raizul') helped the appellants in their nefarious plan by opening bank accounts in Singapore and Johor Baru to facilitate deposits and withdrawals of monies paid by SP1. The trial judge who heard the evidence until the end of the prosecution's case ('the first judge') allowed the prosecution to amend the charges against the appellants to include the element of 'common intention' under s 34 of the Penal Code, particularise the acts of deception upon SP1 and to add alternative charges. An additional charge against one of the appellants was also allowed. Thereafter, the first judge ruled that the prosecution had proven a prima facie case on one amended charge against the first appellant, on three amended charges against the second appellant and on one amended and one additional charge against the third appellant and called for their defence. Although the notes of proceedings stated that the first judge, who was subsequently transferred to a sessions court in another state, would give written grounds for ruling that a prima facie case had been proved, that was never done. The succeeding sessions court judge who took over the hearing of the matter only heard the defence of the three appellants and after ruling that they had failed to raise a reasonable doubt on the prosecution's case, she convicted and sentenced them. On the appellants'

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appeal, the High Court re-evaluated the entire evidence and held that the first judge was right to have found a prima facie had been established and to have called for the defence. The High Court also held the succeeding judge's decision on the totality of the evidence was also correct. In the instant appeal against the High Court's verdict, the appellants contended, inter alia, that: (a) the amendment of the charges and the absence of the grounds of judgment to support the finding of a prima facie case had prejudiced the appellants; (b) there was miscarriage of justice and breaches of ss 173(m)(i) and 261 of the Criminal Procedure Code ('the CPC') when the succeeding sessions court judge dealt only with the defence's case and failed to reconsider the prosecution's case; and (c) Raizul's statement ('exh P97') recorded under s 112 of the CPC was wrongly admitted in evidence (he could not be located to testify as a witness) as there was non-compliance with s 32 of the Evidence Act 1950.

Held, dismissing the appeals and affirming the convictions and sentences:

(1) No prejudice was occasioned to the appellants by the amendments to the charges. The amendments sought to add the elements of cheating and to introduce s 34 of the Penal Code based on substantially the same facts. The amendments did not introduce a different case against the appellants but were in line with the evidence before the trial court. The law was settled that where the facts did not establish a prima facie case against the accused on the charge that was preferred but disclosed another offence for which he was not charged, the court ought to amend the charge unless there was good reason not to do so (see para 33).

(2) There was no statutory provision that required a trial judge to prepare grounds of judgment in finding that a prima facie case had been established and in calling for the defence. The absence of the grounds of judgment did not prejudice the appellants as they knew what they had to answer in their defence (see paras 34–35).

(3) The 'directive' given to the succeeding sessions court judge to take over the hearing of the matter from the first sessions court judge did not breach s 261 of the CPC and did not in any way fetter the succeeding judge's discretion to either hear the case de novo or to continue from where it was left off by the previous judge. It was clear from the grounds of judgment that the succeeding sessions court judge did not consider the defence in isolation but had tested the defence in the light of the case for the prosecution. Section 173(m)(i) of the CPC was sufficiently complied with. The succeeding sessions court judge had meticulously examined the evidence of the prosecution on each of the instances of cheating in this case (see paras 40 & 43–44).

(4) There was clear involvement of all the appellants in the whole transaction where the role of each of them was analysed by the High Court. The High

Court had correctly made inferences from the act or conduct of the appellants in coming to the conclusion that they had common intention to deceive SP1 (see paras 48 & 53).

(5) Raizul's statement (exh P97) was correctly admitted under s 32 of the Evidence Act 1950 as the police had taken reasonable efforts to trace Raizul to secure his attendance at the trial including searching for him at his address, taking out an advertisement in the newspapers and seeking the assistance of Interpol to locate him in Indonesia. It was also alleged that Raizul was an accomplice and the trial judge had failed to address the law on this point. Exhibit P97 disclosed that Raizul had merely carried out the third appellant's instructions to open the bank accounts without knowing the reason for it and without knowing that SP1 had been deceived. Raizul was an accessory after the fact and therefore could not be an accomplice in the commission of the original offence. The contents of exh P97 were corroborated by other evidence and no miscarriage of justice was occasioned by its admission (see paras 55 & 57–59).

(6) On a maximum evaluation of the evidence, the elements of the offence in the charges were proved and the appellants had failed to raise a reasonable doubt on the prosecution's case. The convictions were safe. There was no reason to disturb the sentences that were imposed as it was not shown that the trial court took into consideration extraneous or irrelevant factors in imposing the sentences. The sentences were appropriate in the circumstances of the case. As to whether the sentences should have been ordered to run concurrently and not consecutively, the charges related to different dates and places and for different purposes and there was no proximity of time and place and the aggregate sentences did not offend the totality principle (see paras 65–66, 71 & 75–76).

[Bahasa Malaysia summary

Perayu-perayu dalam ketiga-tiga rayuan disabit dan dihukum untuk mengubah tempoh penjara oleh mahkamah sesyen kerana menipu ahli perniagaan ('SP1') yang ingin membeli tanah untuk pelaburan. Perayu-perayu telah merancang skim untuk meyakinkan SP1 dia membeli dua plot tanah milik Kerajaan Negeri dan bahawa dia telah membayar sejumlah besar wang untuk menjadikannya kenyataan. Seorang individu bernama Raizul bin Manap ('Raizul') telah membantu perayu-perayu dalam rancangan jahat mereka dengan membuka akaun bank di Singapura dan Johor Bahru untuk memudahkan deposit dan pengeluaran wang yang dibayar oleh SP1. Hakim perbicaraan yang mendengar keterangan sehingga akhir kes pendakwaan ('hakim pertama') membenarkan pendakwaan meminda pertuduhan-pertuduhan terhadap perayu-perayu untuk memasukkan elemen 'common intention' di bawah s 34 Kanun Keseksaan, terutamanya tindakan penipuan ke atas SP1 dan untuk menambah pertuduhan-pertuduhan alternatif. Pertuduhan tambahan terhadap salah seorang perayu juga

dibenarkan. Selepas itu, hakim pertama memutuskan bahawa pendakwaan telah membuktikan kes prima facie terhadap satu pertuduhan pindaan terhadap perayu pertama, ke atas tiga pertuduhan pindaan terhadap perayu kedua dan ke atas satu pertuduhan pindaan dan tambahan terhadap perayu ketiga dan dipanggil untuk pembelaan mereka. Walaupun nota prosiding menyatakan bahawa hakim pertama, yang kemudian telah dipindahkan ke mahkamah sesyen di negeri lain, mempunyai alasan bertulis untuk memutuskan bahawa kes prima facie telah dibuktikan, ia tidak pernah berlaku. Hakim mahkamah sesyen berikutnya yang mengambil alih perbicaraan perkara itu hanya mendengar pembelaan ketiga-tiga perayu dan selepas memutuskan bahawa mereka telah gagal untuk menimbulkan keraguan munasabah ke atas kes pendakwaan, beliau telah mensabit dan menghukum mereka. Berdasarkan rayuan perayu-perayu, Mahkamah Tinggi telah menilai semula keterangan dan memutuskan bahawa hakim pertama adalah betul apabila mendapati prima facie dibuktikan dan untuk memanggil pembelaan. Mahkamah Tinggi juga memutuskan bahawa keputusan hakim berikutnya berdasarkan keseluruhan keterangan juga betul. Dalam rayuan ini terhadap keputusan Mahkamah Tinggi, perayu-perayu berhujah, antara lain, bahawa: (a) pindaan pertuduhan-pertuduhan dan ketiadaan alasan penghakiman untuk menyokong penemuan kes prima telah memprejudiskan perayu-perayu; (b) terdapat pelaksaaan keadilan yang salah dan pelanggaran ss 173(m)(i) dan 261 Kanun Tatacara Jenayah ('KTJ') apabila hakim mahkamah sesyen berikutnya hanya berurusan dengan kes pembelaan dan gagal untuk mempertimbang semula kes pendakwaan; dan (c) kenyataan Raizul ('eksh P97') yang direkodkan di bawah s 112 KTJ telah salah diterima sebagai keterangan (dia tidak dapat dikesan untuk memberi keterangan sebagai saksi) kerana ketidakpatuhan s 32 Akta Keterangan 1950 tidak berlaku.

Diputuskan, sebulat suara menolak rayuan-rayuan dan mengesahkan sabitan dan hukuman:

(1) Tiada prejudis berlaku kepada perayu-perayu melalui pindaan-pindaan kepada pertuduhan-pertuduhan itu. Pindaan-pindaan itu dipohon untuk menambah elemen-elemen penipuan dan untuk memperkenalkan s 34 Kanun Keseksaan berdasarkan kebanyakan fakta-fakta yang sama. Pindaan-pindaan itu tidak memperkenalkan kes yang berbeza terhadap perayu-perayu tetapi selaras dengan keterangan di hadapan mahkamah perbicaraan. Undang-undang itu menetapkan bahawa di mana fakta tidak membuktikan kes prima facie terhadap tertuduh atas pertuduhan yang dibuat tetapi menunjukkan kesalahan lain yang dia tidak dituduh, mahkamah patut meminda pertuduhan itu kecuali terdapat sebab kukuh untuk tidak berbuat demikian (lihat perenggan 33).

(2) Tiada peruntukan statutori yang menghendaki hakim perbicaraan menyediakan alasan penghakiman dalam mendapati kes prima facie

telahpun dibuktikan dan dalam memanggil untuk pembelaan. Ketiadaan alasan penghakiman tidak memprejudiskan perayu-perayu kerana mereka mengetahui apa yang mereka ingin jawab dalam pembelaan mereka (lihat perenggan 34–35).

(3) 'Directive' yang diberikan kepada hakim mahkamah sesyen berikutnya untuk mengambil alih perbicaraan perkara itu daripada mahkamah sesyen pertama tidak melanggar s 261 KTJ dan tidak dalam apa cara membelenggu budi bicara hakim berikutnya sama ada untuk mendengar atau meneruskan dari mana ia ditinggalkan oleh hakim terdahulu. Adalah jelas daripada alasan penhakiman bahawa hakim mahkamah sesyen berikutnya tidak mengambil kira pembelaan secara berasingan tetapi telah menguji pembelaan itu berdasarkan kes pendakwaan. Seksyen 173(m)(i) KTJ telah dipatuhi secukupnya. Hakim mahkamah sesyen berikutnya telah memeriksa dengan teliti keterangan pendakwaan untuk setiap perlakuan penipuan dalam kes ini (lihat perenggan 40 & 43–44).

(4) Adalah jelas penglibatan kesemua perayu dalam keseluruhan transaksi di mana peranan setiap daripada mereka telah dianalisis oleh Mahkamah Tinggi. Mahkamah Tinggi telah dengan betul membuat inferens berdasarkan tindakan dan perlakuan perayu-perayu untuk mencapai kepada kesimpulan bahawa mereka mempunyai niat bersama untuk menipu SP1 (lihat perenggan 48 & 53).

(5) Kenyataan Raizul (eksh P97) diterima dengan betul di bawah s 32 Akta Keterangan 1950 kerana polis telah melakukan usaha yang munasabah untuk mengesan Raizul untuk menjamin kehadirannya di perbicaraan termasuk mencarinya di alamatnya, mengeluarkan iklan dalam akhbar dan meminta bantuan Interpol untuk mengesannya di Indonesia. Ia juga dikatakan bahawa Raizul adalah rakan sejenayah dan hakim perbicaraan telah gagal untuk mengutarakan undang-undang berhubung perkara ini. P27 mendedahkan bahawa Raizul hanya melaksanakan arahan perayu ketiga untuk membuka akaun-akaun bank tanpa mengetahui sebab untuknya dan tanpa mengetahui bahawa SP1 telah ditipu. Raizul merupakan aksesori selepas fakta itu dan oleh itu tidak mungkin merupakan rakan bersubahat dalam perlakuan kesalahan asal. Kandungan P97 telah disokong oleh keterangan lain dan tiada pelaksanaan keadilan yang tidak dilaksanaan dengan penerimaanya (lihat perenggan 55 & 57–59).

(6) Berdasarkan penilaian maksimum ke atas keterangan itu, elemen-elemen kesalahan dalam pertuduhan-pertuduhan itu telah dibuktikan dan perayu-perayu telah gagal untuk menimbulkan keraguan munasabah ke atas kes pendakwaan. Sabitan-sabitan itu adalah selamat. Tiada sebab untuk mengganggu hukuman-hukuman yang dikenakan kerana tidak ditunjukkan bahawa mahkamah perbicaraan telah mengambil kira

faktor-faktor tidak berkaitan atau tidak relevan dalam mengenakan hukuman-hukuman itu. Hukuman-hukuman itu adalah sesuai dalam keadaan kes itu. Berhubung sama ada hukuman-hukuman itu patut diperintahkan untuk berjalan serentak dan bukan berturut-turut, pertuduhan-pertuduhan itu berkaitan dengan tarikh-tarikh dan tempat-tempat lain dan untuk tujuan berbeza dan tidak terdapat jarak masa dan tempat yang rapat dan agregat hukuman-hukuman itu tidak melanggar keseluruhan prinsip itu (lihat perenggan 65–66, 71 & 75–76).]]

Notes

For cases on amendment, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 1392–1394.

Cases referred to

Abdul Hamid bin Udin v PP [2006] 6 MLJ 334, HC (refd)
Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534, CA (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217, SC (refd)
Kuan Ted Fatt v PP [1985] 1 MLJ 211, FC (refd)
Mahbub Shah v Emperor [1945] 46 Cr LJ 689, HC (refd)
PP v Dato' Waad bin Mansor [2005] 2 MLJ 101, FC (refd)
PP v Goh Chooi Guan [1978] 2 MLJ 169 (folld)
PP v James Tan [1983] 2 MLJ 173 (refd)
PP v Jorge Enrique Pellon Tellon [1998] 4 MLJ 183, CA (refd)
PP v Lee Jun Ho & Ors [2011] 6 MLJ 220, CA (distd)
PP v Ma'arif [1969] 2 MLJ 65 (refd)
PP v Mohamed Nor & Ors [1985] 2 MLJ 200b, SC (refd)

Legislation referred to

Criminal Procedure Code ss 47, 49, 112, 118, 173(h)(ii) , (m)(i), 261, 294, 396
Evidence Act 1950 ss 8, 32
Penal Code s 34

Appeal from: Criminal Trial Nos 62–20 of 1996, 62–21 of 1996 and 62–22 of 1996 (High Court, Johor Bahru).

Gooi Soon Seng (Christy Lim Ying Ying with him) (Gooi & Azura) in Criminal Appeal No J-09–112–04 of 2012 for the appellant.
S Prakash (Kamil Hashim Raj & Lim) in Criminal Appeal No J-09–111–04 of 2012 for the appellant.
Gobind Singh Deo (Mohd Hajian Omar & Joanne Chua Tsu Chua with him)

(Gobind Singh Deo & Co) in Criminal Appeal No J-09–117–04 of 2012 for the appellant.

Dzulkifli bin Ahmad (Awang Armadajaya bin Awang Mahmud with him) (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal No J-09–112–04 of 2012 for the respondent.

Dzulkifli bin Ahmad (Awang Armadajaya bin Awang Mahmud with him) (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal No J-09–111–04 of 2012 for the respondent.

Dzulkifli bin Ahmad (Awang Armadajaya bin Awang Mahmud with him) (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal No J-09–117–04 of 2012 for the respondent.

Tengku Maimum JCA:

INTRODUCTION

[1] These three appeals arose out of the decision of the High Court at Johor Bahru in affirming the convictions and sentences passed by the sessions court against the three appellants for the offence of cheating. The original charges against the appellants read:

(a) The first appellant

> Bahawa kamu di antara 28 Jun 1995 hingga 25 Julai 1995, di Hotel Hyatt Regency, Jalan Sungai Chat, di dalam daerah Johor Bahru, di dalam negeri Johor, telah menipu Dato' Ding Lian Cheon (No. K/P: K314993) seorang pengarah syarikat Solid Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau, supaya mempercayai bahawa kamu telah mendapatkan kelulusan dari Majlis Mesyuarat Negeri Johor untuk permohonan pembelian tanah di Lot 21448 dan Lot 1152, di Jalan Skudai, Johor Bahru, Johor dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan sekeping Cashier's Order Hong Kong and Shanghai Banking Corporation Limited, Singapore, No. 723084 yang bernilai S$3,450,000.00 atas nama Abdul Ghani bin Othman No. K/P 5834921 bertarikh 13 Julai 1995, kepada Md. Jhomi bin Md Supian No. K/P 46489798 sebagai pembayaran kerana berjaya mendapat kelulusan permohonan tanah berkenaan, yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 420 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

(b) The second appellant

> (i) Bahawa kamu di antara 28 Jun 1995 dan 25 Julai 1995, di Hotel Hyatt Regency, Jalan Sungai Chat, di dalam daerah Johor Bahru, di dalam negeri Johor, telah menipu Dato' Ding Lian Cheon (No. K/P : K314993) seorang pengarah syarikat Solid Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa kamu telah mendapatkan kelulusan dari

Majlis Mesyuarat Negeri Johor untuk permohonan pembelian tanah di Lot 21448 dan Lot 1152, di Jalan Skudai, Johor Bahru, Johor oleh syarikat Solid Estate (Sarawak) Sdn Bhd dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan sekeping Cashier's Order Hong Kong and Shanghai Banking Corporation Limited, Singapore, No. 723084 yang bernilai S$3,450,000.00 atas nama Abdul Ghani bin Othman NO. K/P 5834921 bertarikh 13 Julai 1995, kepada Md. Jhomi bin Md Supian No. K/P 4648978 sebagai pembayaran kerana berjaya mendapat kelulusan permohonan tanah berkenaan, yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 420 Kanun Keseksaan dan boleh dihukum di bawah peruntukkan yang sama.

(ii) Bahawa kamu pada 10hb September 1995 di Hotel Tanah Mas, Lot 277, Blok 5, Jalan Kampong Nyabor, di dalam daerah Sibu, di dalam Negeri Sarawak, telah menipu Dato' Ding Lian Cheon (No. K/P: K 314993) seorang pengarah syarikat Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa kamu telah mendapatkan kelulusan dari Majlis Mesyuarat Negeri Johor untuk permohonan pembelian tanah di Lot 21448 dan Lot 1152, Jalan Skudai, Johor Bahru, Johor, oleh syarikat Solid Estate (Sarawak) Sdn Bhd dan dengan itu telah dengan curangnya mendorong Dato' Domg Lian Cheon untuk menyerahkan wang tunai berjumlah RM2,000,000.00 kepada kamu pada 23hb September 1995, di Hotel Hyatt Regency, di Jalan Sungai Chat, di dalam daerah Johor Bahru di dalam negeri Johor, kerana telah berjaya mendapat pembatalan tuntutan premium dan tuntutan pelbagai tersebut bagi permohonan tanah yang berkenaan yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 420 Kanun Keseksaan dan boleh dihukum di bawah peruntukkan yang sama.

(iii) Bahawa kamu pada 23hb September 1995 dan 27hb Oktober 1995, di alamat 17, Jalan Wong Nai Siong, di dalam daerah Sibu, di dalam Negeri Sarawak, telah menipu Dato' Ding Lian Cheon (No. K/P: K314993) seorang pengarah syarikat Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa kamu telah mendapatkan kelulusan dari Majlis Mesyuarat Negeri Johor untuk permohonan pembelian tanah di Lot 21448 dan Lot 1152, di Jalan Skudai, Johor Bahru, Johor dari 99 tahun kepada 999 tahun dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan wang tunai berjumlah RM1,3000,000.00 kepada kamu di Hotel Hyatt Regency, di Jalan Sungai Chat, di dalam daerah Johor Bahru, di dalam negeri Johor, untuk tujuan mendapatkan kelulusan tersebut, yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 420 Kanun Keseksaan dan boleh dihukum di bawah peruntukkan yang sama.

(c) The third appellant

Bahawa kamu di antara 28 Jun 1995 dan 25 Julai 1995, di Hotel Hyatt

Regency, Jalan Sungai Chat, di dalam daerah Johor Bahru, di dalam negeri Johor, telah bersubahat dengan Yap You Jee No. K/P 490216-01-5405 dan Md. Jhomi bin Md. Supian No. K/P 540516-01-5375 untuk menipu Dato' Ding Lian Cheon (No. K/P: K314993) seorang pengarah syarikat Solid Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa kamu telah mendapatkan kelulusan dari Majlis Mesyuarat Negeri Johor untuk permohonan pembelian tanah di Lot 21448 dan Lot 1152, di Jalan Skudai, Johor Bahru, Johor dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan sekeping Cashier's Order Hong Kong and Shanghai Banking Corporation Limited, Singapore No. 723084 yang bernilai S$3,450,000.00 atas nama Abdu Ghani bin Othman No. K/P 5834921 bertarikh 13 Julai 1995, kepada Md. Jhomi bin Md. Supian No. K/P 4648978 sebagai pembayaran kerana berjaya mendapat kelulusan tanah berkenaan yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian di mana kesalahan ini telah dilakukan hasil daripada persubahatan kamu dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 109 Kanun Keseksaan dibaca bersama seksyen 420 Kanun Keseksaan dan boleh dihukum di bawah peruntukkan yang sama.

THE PROSECUTION'S CASE

[2] The case for the prosecution may be summarised as follows. Dato' Ding Lian Cheon ('SP1'), a businessman from Sarawak wanted to buy land for investment in Peninsular Malaysia. SP1's friend Loi Teck Hui ('SP2') informed SP1 about some pieces of land in Johor Bahru. SP1 agreed to buy two pieces of land, namely Lots 21448 and 1142, Jalan Skudai, Johor Bahru. The land were shown to SP1 by the first appellant, a land broker. The first appellant told SP1 that the land belonged to the State Government of Johor and that SP1 had to pay RM7.5m to the Menteri Besar on behalf of the State Goverment plus premium of not more than RM15 per sq foot. The first appellant also informed SP1 that the application must be made in writing to the Menteri Besar. For that purpose the first appellant gave SP1 a sample letter ('P2').

[3] Based on the said sample letter, SP1 prepared an application vide a letter addressed to the Menteri Besar of Johor ('exh P3'). Exhibit P3 was given to the first appellant where the first appellant informed SP1 that he will forward the letter to the Menteri Besar. The first appellant had also written on a piece of paper ('P4'), the name of the Menteri Besar ie Abdul Ghani bin Othman and the identity card number for SP1 to buy a cashier's order in the sum of RM6m. A copy of the cashier's order was to be given to the first appellant. The first appellant wanted to see whether SP1 had the money before he could assist SP1 with the application. The cashier's order for S$3.45m in the name as per the particulars given by the first appellant was accordingly bought by SP1.

[4] Thereafter, the first appellant informed SP1 that the application for the said land had been approved. On 25 July 1995 when SP1 came to Johor Bahru with SP2 and Chew Kwong Cheong, a valuer ('SP4'), the first appellant waited for SP1 at the airport. After sending SP1 to check in at Hotel Hyatt, Johor Bahru, the first appellant proceeded to the then State Secretariat at Bukit Timbalan, Johor Bahru with SP2 and SP4. At Bukit Timbalan, the first appellant fetched the second appellant who was carrying a brief case and was dressed in a coat and neck tie. The first appellant got down from his car and had opened the door for the second appellant. They then met SP1 in his hotel room. The second appellant was introduced by the first appellant to SP1 as the private secretary to the Menteri Besar. The second appellant had also introduced himself to SP1 as the secretary of the Menteri Besar.

[5] In the hotel room, the second appellant took out a bundle of document from his brief case. In the presence of the first appellant, SP2 and SP4, the second appellant showed SP1 the file relating to the application for the said land and informed SP1 that the application had been approved by the State Executive Council ('EXCO'). The second appellant then asked for the cashier's order. The cashier's order was given by SP1 to the second appellant who said that he will give it to the Menteri Besar. When asked by SP1 why he needed to pay when the approval had not been formally issued, the second appellant said that the political party of the Menteri Besar needed the money urgently.

[6] On 8 September 1995, the first and the second appellants went to Sibu to hand over to SP1 the approval letter from Pejabat Tanah dan Galian Johor Bahru dated 6 September 1995 ('P6B') for the alienation of the Lots 21148 and 1152, Jalan Skudai, Johor Bahru. Apart from the approval letter, the second appellant also gave SP1 Form 5A ('P7A') for the payment of premium in the sum of RM4,786,095. The second appellant however informed SP1 that the State Government had exempted the payment of premium. The sum has to be paid instead to his boss for political purposes. SP1 agreed to pay only RM4m which was accepted by the second appellant. It was agreed that the RM4m will be paid in two instalments, in the sum of RM2m each instalment.

[7] The first payment of the RM2m in lieu of the premium was made by SP1 on 23 September 1995 at Hyatt Hotel Johor Bahru. The second appellant came to the Hotel with a Malay lady, who was introduced to SP1 as the wife of the Menteri Besar. The brief case containing RM2m cash was given by SP1 to the second appellant who then gave the brief case to the the wife of the Menteri Besar.

[8] SP1 was then not very happy with the lease of 99 years and wanted to extend the lease of the said land to 999 years. The second appellant agreed to assist in extending the lease on payment of RM1m. The payment of RM1m

was made to the second appellant on 5 October 1995 for the purpose of extending the lease. To speed up the application for the extension of the lease, a further payment of RM300,000 was made to the second appellant on 27 October 1995.

[9] In January 1996, SP1 realised that there was an error in the lot number. Whilst his application was for lot number 21448, the letter of approval ('P6B') and Form 5A ('P7A') stated the lot number as 21148. Upon checking with the land office, SP1 came to know that P6B and P7A were forged documents.

[10] As it turned out, there was no such approval by the EXCO and no letter was issued by the land office in respect of the said land which in fact do not belong to the State Government. The particulars given by the first appellant for the cashier's order were not the particulars of the Menteri Besar. One Raizul bin Manap, disguised as 'Abdul Ghani bin Othman' had opened the bank accounts in Singapore and Johor Bahru to facilitate the deposits and withdrawals of the monies paid by SP1. The second appellant was not the secretary to the Menteri Besar and the Malay lady who came with the second appellant to collect the RM2m cash was not the wife of the Menteri Besar but the wife of the third appellant. SP1 then informed the first appellant about the error in the lot number and the false identity card of the Menteri Besar. The first appellant told SP1 that the first appellant would wait for his boss, Dato' Dr Johari (the third appeallant) to come back from outstation to discuss the matter.

[11] A police report was subsequently lodged by SP1, leading to the police tracing the monies and resulting in the charges being preferred against the appellants as stated above.

[12] At the close of the prosecution's case, the prosecution applied to amend the charges against all the appellants. The amendment entailed the insertion of common intention under s 34 of the Penal Code and the particularisation of the deception. Alternative charges were also preferred against all the appellants and as against the third appellant, there was an additional charge.

[13] The sessions court judge (the previous sessions court judge) allowed the amendment of the charges and found that the prosecution had made out a prima facie case on one amended charge against the first appellant, on three amended charges against the second appellant and on one amended and one additional charge against the third appellant.

[14] The appellants were ordered to enter their defence on the amended charges, which read:

(a) The first appellant

Bahawa kamu bersama Md. Jhomi bin Md Supian (No. KP 540516-01-5375) dan Hj. Johari bin Mansor (No. KP: 5663719) di antara 28 Jun 1995 hingga 25 Julai 1995, di Hotel Regency, Jalan Sungai Chat, di dalam Daerah Johor Bahru, di dalam Negeri Johor dan untuk mencapai niat bersama kamu, telah menipu Dato' Ding Lian Cheon (No. KP: K314993) seorang pengarah syarikat Solid Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa:

(i) tanah Lot 21448 dan Lot 1152 di Jalan Skudai, Johor Bahru adalah milik Kerajaan Negeri Johor;

(ii) tanah ini boleh dipohon untuk dibangunkan dengan bayaran RM7.5 juta dan premium tidak melebihi RM15 untuk satu kaki persegi;

(iii) kamu boleh menguruskan permohonan tersebut;

(iv) kelulusan Majlis Mesyuarat Negeri Johor telah diperolehi

dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan sekeping Cashier's Oder Hong Kong and Shanghai Banking Corporation Limited, Singapore, No. 723084 yang bernilai S$3,450,000.00 atas nama Abdul Ghani bin Othman, No. KP 5834921, bertarikh 13 Julai 1995, kepada Md. Jhomi bin Md. Supian (No. KP: 540516-01-5375) sebagai pembayaran kerana berjaya mendapat kelulusan permohonan tanah yang berkenaan, yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 420 Kanun Keseksaan yang dibaca bersama seksyen 34 Kanun yang sama.

(b) The second appellant

(i) Bahawa kamu bersama Yap You Jee (No. KP: 490216-10-5405) dan Hj. Johari bin Mansor (No. KP: 5663719) di antara 28 Jun hingga 25 Julai 1995, di Hotel Hyatt Regency, Jalan Sungai Chat, di dalam Daerah Johor Bahru, di dalam Negeri Johor dan untuk mencapai niat bersama kamu, telah menipu Dato' Ding Lian Cheon (No. KP: K314993) seorang pengarah Syarikat Solid Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa:

(i) tanah Lot 21448 dan Lot 1152 di Jalan Skudai, Johor Bahru adalah milik Kerajaan Negeri;

(ii) tanah ini boleh dipohon untuk dibangunkan dengan bayaran RM7.5 juta dan premium tidak melebihi RM15 untuk satu kaki persegi;

(iii) kamu boleh menguruskan permohonan tersebut;

(iv) kelulusan Majlis Mesyuarat Negeri Johor telah diperolehi

dan dengan itu telah telah curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan sekeping Cashier's Order Hong Kong Shanghai Banking Corporation Limited, Singapore, No. 723084 yang bernilai S$3,450,000.00

atas nama Abdul Ghani bin Othman No. KP: 5834921, bertarikh 13 Julai 1995, kepada kamu sebagai pembayaran kerana berjaya mendapat kelulusan permohonan tanah yang berkenaan, yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 420 Kanun Keseksaan yang dibaca bersama seksyen 34 Kanun yang sama.

(ii) Bahawa kamu bersama Hj. Johari bin Mansor (No. KP 5663719) pada 10 September 1995, di Hotel Tanahmas, Lot 277, Blok 5, Jalan Kampong Nyabor, di dalam Daerah Sibu, di dalam Negeri Sarawak, dan untuk mencapai niat bersama kamu, telah menipu Dato' Ding Lian Cheon (No. KP K314993) seorang pengarah syarikat Solid Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa kamu telah mendapatkan pembatalan tuntutan premium dan tuntutan pelbagai dari Majlis Mesyuarat Negeri Johor bagi permohonan pembelian tanah di Lot 21448 dan Lot 1152, di Jalan Skudai, Johor Bahru, Johor oleh syarikat Solid Estate (Sarawak) Sdn Bhd dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan wang tunai berjumlah RM2,000,000.00 kepada kamu pada 23 September 1995 di Hotel Hyatt Regency, di Jalan Sungai Chat, di dalam Daerah Johor Bahru, di dalam Negeri Johor, kerana telah berjaya mendapat pembatalan tuntutan premium dan tuntutan pelbagai tersebut bagi permohonan tanah yang berkenaan, yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 420 Kanun Keseksaan yang dibaca bersama seksyen 34 Kanun yang sama.

(iii) Bahawa kamu pada 23 September 1995 hingga 27 Oktober 1995, di alamat 17, Jalan Wong Nai Siong, di dalam Daerah Sibu, di dalam Negeri Sarawak, telah menipu Dato' Ding Lian Cheon (No. KP: K314993) seorang pengarah syarikat Solid Estate (Sarawak) Sdn Bhd, dengan memperdayakan beliau untuk mempercayai bahawa kamu boleh mendapatkan kelulusan dari Majlis Mesyuarat Negeri Johor bagi melanjutkan pajakan Mukim untuk tanah di Lot 21448 dan Lot 1152, di Jalan Skudai, Johor Bahru, Johor, dari 99 tahun kepada 999 tahun dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan wang tunai berjumlah RM1,300,000.00 kepada kamu di Hotel Hyatt Regency, di Jalan Sungai Chat, di dalam Daerah Johor Bahru di dalam Negeri Johor, untuk tujuan mendapatkan kelulusan tersebut, yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 420 kanun Keseksaan.

(c) The third appellant

(i) Bahawa kamu bersama Md. Jhomi bin Md. Supian (No. KP:540516-01-5375) dan Yap You Jee (No. KP: 490216-10-5405) di antara 28 Jun hingga 25 Julai 1995, di Hotel Hyatt Regency, Jalan Sungai Chat, di dalam Daerah Johor Bahru, di dalam Negeri Johor dan untuk mencapai niat bersama kamu, telah menipu Dato' Ding Lian Cheon (No. KP: K314993) seorang pengarah syarikat Solid Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa:

(i) tanah Lot 21448 dan Lot 1152 di Jalan Skudai, Johor Bahru adalah milik Kerajaan Negeri Johor;

(ii) tanah ini boleh dipohon untuk dibangunkan dengan bayaran RM7.5 juta dan premium tidak melebihi RM15 untuk satu kaki persegi;

(iii) kamu boleh menguruskan permohonan tersebut;

(iv) kelulusan Majlis Mesyuarat Negeri Johor telah diperolehi

dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan sekeping Cashier's Order Hong Kong Shanghai Banking Corporation Limited, Singapore, No. 723084 yang bernilai S$3,450,000.00 atas nama Abdul Ghani bin Othman, No. KP: 5834921, bertarikh 13 Julai 1995, kepada Md. Jhomi bin Md. Supian (No. KP: 540516-01-5375) sebagai pembayaran kerana berjaya mendapat kelulusan permohonan tanah yang berkenaan, yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 420 Kanun Keseksaan yang dibaca bersama seksyen 34 Kanun yang sama.

(ii) Bahawa kamu bersama Md. Jhomi bin Md. Supian (No. KP: 540516-01-5375) pada 10 September 1995, di Hotel Tanahmas, Lot 277, Blok 5, Jalan Kampong Nyabor, di dalam Daerah Sibu, di dalam Negeri Sarawak, dan untuk mencapai niat bersama kamu telah menipu Dato' Ding Lian Cheon (No. K/P K314993) seorang pengarah syarikat Solid Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa kamu telah mendapat pembatalan tuntutan premium dan tuntutan pelbagai dari Majlis Mesyuarat Negeri Johor bagi permohonan pembelian tanah di Lot 21448 dan Lot 1152 di Jalan Skudai, Negeri Johor oleh syarikat Solid Estate (Sarawak) Sdn Bhd dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan wang tunai berjumlah RM2,000,000.00 kepada kamu pada 23 September 1995, di Hotel Hyatt Regency, di Jalan Sungai Chat di dalam Daerah Johor Bahru, di dalam Negeri Johor, kerana telah berjaya mendapat pembatalan tuntutan premium dan tuntutan pelbagai tersebut bagi permohonan tanah yang berkenaan, yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 420 Kanun Keseksaan yang dibaca bersama seksyen 34 Kanun yang sama.

[15] It appeared in the notes of proceedings that the previous sessions court judge will provide written grounds for the prima facie case but the grounds of judgment was never written as the previous sessions court judge was subsequently transferred to the sessions court at Butterworth.

THE DEFENCE CASE

[16] The defence case was heard by another sessions court judge (the succeeding sessions court judge). All the three appellants gave evidence under oath. The gist of the defence is as follows.

The first appellant

[17] The first appellant did not deny the meetings between him and SP1 on several occasions including when he introduced the second appellant to SP1 to discuss the application of the said land. His defence was that he was merely a land broker and that whatever representation given by him to SP2 in respect of the said land was based on the representation that was given to him as a broker, by the third appellant. The first appellant said that he was introduced to the second appellant by the third appellant and that he merely introduced the second appellant to SP1 as Mohamed Jhomi and not as the secretary to the Menteri Besar. He further stated that he had no dishonest intention to deceive SP1 and that SP1 was not deceived by him. There was no inducement from him against SP1 for any payment made to the second appellant.

The second appellant

[18] The second appellant did not dispute that he was present during those times stated in the charge against him. His defence was that he was promised RM30,000 from Habil (which he had not received until to date) to do certain things and he believed Habil who represented to him that the instructions were taken from the third appellant. The second appellant stated that he took full instructions from Habil and not the third appellant. The second appellant further stated that he was asked to meet a billionaire so he was instructed to wear coat and neck tie and that was the first time that he met the first appellant. The second appellant said he introduced himself as 'Mat' the messenger boy or office boy and that he was told by Habil that the wife of the VIP was actually the third appellant's wife but he never saw her there.

The third appellant

[19] The third appellant denied the prosecution's case. The fact that his wife, Rosnani bt Abdul Rahman had collected the RM2m from SP1 was not sufficient to infer that she went to collect the money on his instruction. He stated that he had never met SP1 and that there was no direct evidence to show that he had deceived SP1 which resulted in SP1 parting with the cashier's order of S$3.45m.

THE FINDINGS OF THE TRIAL COURT

[20] At the end of the defence case, the succeeding sessions court judge found that the appellants failed to raise a reasonable doubt on the prosecution's case. In her grounds of judgment, the succeeding sessions court judge stated that since she had been directed to continue at the defence case, there was no need for her to re-visit or review the prosecution's case, which had been considered by the previous sessions court judge in deciding that the prosecution had made out a prima facie case against the appellants. As such the succeeding sessions court judge took the approach to only deal with the defence case in her grounds of judgment.

[21] Having found that the appellants had failed to raise a reasonable doubt on the prosecution's case, the succeeding sessions court judge convicted and sentenced the appellants as follows:

(a) the first appellant was sentenced to three years imprisonment from the date of sentence;

(b) the second appellant was sentenced to two years imprisonment for each charge. The sentences were to run consecutively; and

(c) the third appellant was sentenced to three years imprisonment for each charge. The sentences were to run consecutively.

THE APPEAL TO THE HIGH COURT

[22] Aggrieved by the decision, the appellants filed an appeal to the High Court against the conviction and sentence. Each of the appellant raised various grounds of appeal in the petition of appeal. They had also raised the following preliminary issues:

(a) the amendment of the charges by the previous sessions court judge;

(b) the wrong standard of proof applied by the previous sessions court judge in calling for the defence;

(c) the absence of a written grounds of judgment by the previous sessions court judge at the end of the prosecution's case;

(d) the failure of the succeeding sessions court judge to review the case for the prosecution; and

(e) non-compliance with s 261 of the Criminal Procedure Code ('the CPC').

FINDINGS OF THE HIGH COURT

[23] The High Court judge found that the preliminary issues were devoid of merits and ruled against the appellants on those preliminary issues. In respect of the substantive grounds of appeal, the High Court judge considered the issue whether the previous sessions court judge was correct in calling for the appellants to enter their defence. Guided by the cases of *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217; *Public Prosecutor v Ma'arif* [1969] 2 MLJ 65, and *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800, the High Court judge then undertook the exercise of evaluating the evidence at the end of the prosecution's case. Having done so and having addressed his mind to the elements of the offence in the charges, the High Court judge found that there was credible evidence to prove the elements and that the previous sessions court judge was correct to find that the prosecution had made out a prima facie case against the appellants and in calling the appellants to enter their defence.

[24] The High Court judge then proceeded to examine the defence and having analysed the defence as against all the evidence before the court, found that the appellants failed to cast a reasonable doubt on the prosecution's case. The conviction of the appellants by the succeeding sessions court judge was thus affirmed. As regards the sentence, the High Court judge found no reason to disturb the sentences passed by the succeeding sessions court judge. The sentences were similarly affirmed. Dissatisfied, the appellants filed an appeal to the Court of Appeal.

THE APPEAL

[25] The main grounds of appeal canvassed by Mr Gobind Singh Deo for the third appellant (which were adopted by Mr Gooi Soon Seng for the first appellant and Mr Prakash for the second appellant) were:

(a) the amendment of the charges;

(b) the absence of the grounds of judgment by the previous sessions court judge at the end of the prosecution's case;

(c) the application of s 261 of the CPC ; and

(d) the error on the part of the succeeding sessions court judge in failing to reconsider the prosecution's case and in dealing with only the defence case.

[26] The submission also canvassed on whether the High Court judge was correct to go through the evidence as if he was the trial judge.

[27] The main issues submitted by Mr Gooi Soon Seng for the first appellant were whether Raizul's statement ('exh P97') was properly admitted under s 32 of the Evidence Act 1950 and whether the subject matter of the charges were corrupt money paid to the Menteri Besar in order for SP1 to obtain the said land.

[28] For the second appellant, Mr Prakash had submitted on the credibility of Lim Boey Geok ('SP17') whose evidence was not in favour of the prosecution.

FINDINGS

[29] We observed that the grounds of appeal are mainly directed to the prima facie case. Essentially learned counsel for the respective appellants argued that the prosecution had not made out a prima facie case against the appellants.

First issue: The amendment of the charges

[30] On this issue, it was submitted by Mr Gobind that the amendments were prejudicial to the third appellant as they sought to introduce a totally different case for the prosecution against him.

[31] Insofar as amendment is concerned, s 173(h)(ii) of the CPC provides:

> If the court finds that a prima facie case has been made out against the accused on an offence other than the offence charged which the Court is competent to try and which in the opinion of the Court it ought to try, the Court shall amend the charge ... .

[32] We did not lose sight of the fact that there was no grounds of judgment written by the previous sessions court judge to justify the amendment, but this issue was dealt with by the High Court as follows:

> [24] Perayu ketiga pada 16 Februari 1996 telah dituduh dengan satu pertuduhan sahaja di bawah s 420 Kanun Keseksaan dibaca bersama s 109 Kanun Keseksaan kerana bersubahat dengan perayu pertama dan perayu kedua.
>
> [25] Pada 16 April 1998 pendakwaan telah meminda pertuduhan asal terhadap perayu ketiga dengan pertuduhan-pertuduhan berikut:
>
> (i) pertuduhan pertama pindaan ('eksh P103') di bawah s 420 Kanun Keseksaan dibaca bersama s 34 Kanun Keseksaan kerana bersama perayu pertama dan perayu 2 untuk mencapai niat bersama telah menipu dan dengan curangnya mendorong Dato' Ding Lian Cheon menyerahkan cashier's order bernilai SD3.45 juta.

(ii) pertuduhan pertama alternatif kepada pertuduhan pertama ('eksh P103A') iaitu di bawah s 420 Kanun Keseksaan dibaca bersama s 109 Kanun Keseksaan kerana bersubahat dengan perayu pertama berkaitan dengan cashier's arder bernilai SD3.45 juta.

(iii) pertuduhan kedua alternatif kepada pertuduhan pertama pindaan ('eksh P103B') iaitu di bawah s 420 Kanun Keseksaan dibaca bersama s 109 Kanun Keseksaan kerana bersubahat dengan perayu kedua berkaitan dengan cashier's order bernilai SD3.45 juta.

(iv) Pertuduhan kedua ('eksh P104') iaitu di bawah s 420 Kanun Keseksaan dibaca bersama s 34 Kanun Keseksaan berkaitan dengan wang berjumlah RM2 juta. Ini merupakan pertuduhan tambahan baru.

[26] Perbezaannya pertuduhan (i) di atas melibatkan 'common intention' di bawah s 34 Kanun Keseksaan Kanun Keseksaan manakala di dalam pertuduhan (ii) dan (iii) di atas ianya melibatkan 'abetment' di bawah seksyen 109 Kanun Keseksaan. Namun begitu ketiga-tiga pertuduhan tersebut melibatkan cashier's order berjumlah SD3.45 juta yang sama kecuali pertuduhan (iv) di atas yang melibatkan RM 2 juta.

[27] Pada 17 Julai 2000 hakim mahkamah sesyen terdahulu telah mengarahkan perayu ketiga dipanggil untuk membela diri terhadap pertuduhan (i) di bawah s 420 Kanun Keseksaan dibaca bersama s 34 Kanun Keseksaan iaitu melibatkan 'common intention' berkaitan dengan cashier's order bernilai SD3.45 juta dan pertuduhan (iv) juga di bawah s 420 Kanun Keseksaan dibaca bersama s 34 Kanun Keseksaan berkaitan dengan wang berjumlah RM2 juta tetapi keadaan tidak sama bagi pertuduhan (ii) dan (iii) di bawah s 420 Kanun Keseksaan dibaca bersama dengan s 109 Kanun Keseksaan kerana kesemua pertuduhan alternative kepada pertuduhan pertama yang melibatkan 'abetment' itu pembelaan langsung tidak dipanggil.

[28] Oleh itu tidak timbullah isu bahawa hakim mahkamah sesyen terdahulu khilaf apabila membenarkan pihak pendakwaan meminda kesemua pertuduhan asal sebab keputusan beliau tidak memanggil pembelaan terhadap pertuduhan alternative kepada pertuduhan pindaan itu berdasarkan pertimbangan telitinya ke atas keterangan keseluruhan di akhir kes pendakwaan. Jadi dalam keadaan sedemikian mana mungkin juga dikatakan ianya telah memprejudiskan ketiga-tiga perayu dalam kes ini.

[33] We agree with the above findings of the High Court judge that no prejudice had been occasioned to the appellants. Looking at the records of appeal, we find that the amendments were in line with the evidence before the court. The amendments do not introduce a different case against the appellants. The amendments sought to add the elements of cheating and to introduce s 34 of the Penal Code, based on substantially the same facts. The law is settled that where the facts do not establish a prima facie case against the accused on the charge preferred against him but disclose another offence for which he is not charged, the court ought to amend the charge unless there is good reason not to do so (see *Public Prosecutor v James Tan* [1983] 2 MLJ 173;

Public Prosecutor v Jorge Enrique Pellon Tellon [1998] 4 MLJ 183). We therefore find no merits in this ground of appeal.

Second issue: The absence of grounds of judgment for the prima facie case

[34] There is no statutory provision requiring a trial judge to prepare grounds of judgment in finding a prima facie case and in calling for the defence (see *Junaidi Abdullah v Public Prosecutor* [1993] 3 MLJ 217; *Abdul Hamid bin Udin v Public Prosecutor* [2006] 6 MLJ 334). The issue of absence of grounds of judgment for the decision at the close of the case of the prosecution would not have arisen in this appeal but for the fact that different sessions court judges heard the case for the prosecution and the defence. And much has been made out of the fact that the previous sessions court judge had promised to give a written grounds for the prima facie case.

[35] We noted Mr Gobind's submission on the point of fair trial and that he was not able to stand up and submit or challenge the findings or reasons for the prima facie case. In our view, the absence of the grounds of the judgment has not prejudiced the appellants. To our mind, what is more important at the close of the case for the prosecution is for the accused to know what is it that he has to answer in his defence. It is not the case here that the appellants were prejudiced for not being able to put up his defence properly. We similarly find this ground of appeal without merits.

Third issue: Section 261 of the CPC

[36] Section 261 of the CPC provides:

> 261 Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction in it and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial:
>
> Provided as follows:
>
> (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;
>
> (b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had, if that Court is of opinion that the accused had been materially prejudiced thereby, and may order a new trial.

[37] It was submitted by Mr Gobind that the transfer of a sessions court judge from one state to another does not cause her to 'cease jurisdiction in the

matter', a pre-requisite which is mandatory for the operation of s 261 of the CPC. In support thereof counsel relied on the decision of Syed Agil Barakbah in *Public Prosecutor v Goh Chooi Guan* [1978] 2 MLJ 169.

[38] We agree with Syed Agil Barakbah J in *Goh Chooi Guan*, where he opined that a magistrate ceases to have jurisdiction in a criminal case by his untimely death, retirement or resignation and that the section does not apply in the case of transfer of the magistrate to another state. We are of the view that where a magistrate or a sessions court judge has been transferred to another state, he retains the jurisdiction in the matter and he may continue and complete the cases that he has heard partly. However, to save time and money and to expedite the disposal of part-heard cases, the succeeding magistrate or sessions court judge may continue the trial from where the predecessor left.

[39] Coming back to the appeal, the grievance of Mr Gobind arose out of the following grounds of judgment of the succeeding sessions court judge:

> Saya telah diarahkan untuk sambung bicara kes ini daripada hakim mahkamah sesyen terdahulu iaitu meneruskan di peringkat pembelaan.

It was the submission of Mr Gobind that the succeeding sessions court judge has the option to either hear the case *de-novo* or to act on the evidence recorded partly by the previous sessions court judge. The 'directive' given to the succeeding sessions court judge to take over the matter and to continue at the defence stage, contended learned counsel, is contrary to s 261.

[40] We agree that pursuant to s 261 of the CPC, the succeeding sessions court judge has a complete discretion to either hear the case de novo or to continue from the point where it has been left by the previous sessions court judge. However we do not agree that the 'directive' given to the succeeding sessions court judge amounts to a breach of the provisions of s 261. It has been a practice for the Chief Judge or the Chief Registrar to decide on whether the part-heard cases would be completed either by the previous presiding magistrate or sessions court judge or by his successor and this decision or 'directive' was purely administrative, given with the primary purpose to speed up the disposal of the part heard cases. The 'directive' which was given administratively could not and did not in any way fetter the discretion of the succeeding magistrate or sessions court judge provided for under s 261 of the CPC . The duty remains on the magistrate or the sessions court judge to act under the provisions of s 261 of the CPC. In particular, if the succeeding magistrate or sessions court judge acts on the evidence which has been recorded by his predecessor, the right to recall witnesses must be observed. In this appeal, we find no issue on the right of the appellants to recall witnesses. In the circumstances, the 'directive' given to the succeeding sessions court judge has not prejudiced the appellants and has not breached s 261 of the CPC.

Fourth issue: Failure of the succeeding sessions court judge to consider all the evidence at the end of the defence case

[41] There was another issue relating to s 261 of the CPC . It was on the approach taken by the succeeding sessions court judge at the end of the defence case where she took the view that she need not reconsider the case for the prosecution. This is apparent from her grounds of judgment:

> Oleh kerana kes ini tidak di *de novo* tetapi disambung bicara. Justeru itu saya berpendapat keputusan hakim mahkamah sesyen terdahulu tidak perlu dikaji semula oleh saya. Saya dapati segala isu yang dibangkitkan oleh peguambela di dalam kes ini di peringkat pembelaan telah dikemukakan semasa kes pendakwaan. Saya pasti hakim mahkamah sesyen terdahulu telah menimbangkan dengan terperinci isu-isu tersebut sehingga beliau memutuskan pihak pendakwaan telah berjaya membuktikan satu kes prima facie terhadap ketiga-tiga OKT. Oleh itu tidak timbul isu untuk saya revisit/kaji semula kes ini daripada permulaan sehingga di peringkat pendakwaan dan membuat keputusan sekali lagi terhadap kes pendakwaan.

[42] It was submitted by Mr Gobind that in failing to consider the whole evidence, the succeeding sessions court judge seriously misdirected herself, resulting in serious miscarriage of justice to the appellants.

[43] We have perused the grounds of judgment of the succeeding sessions court judge and we noted that at pp 445–452 of the appeal record Vol 2, the succeeding sessions court judge had tabulated 'Ringkasan Pendakwaan' at the end of the case for the prosecution. Further, reading the grounds of judgment, we find that the succeeding sessions court judge had not considered the defence in isolation but had tested the defence in the light of the case for the prosecution (see for example pp 461–462, 477–479, and 488 of the appeal record Vol 2). In our view there was sufficient compliance by the succeeding sessions court judge of s 173(m)(i) of the CPC which provides that:

> At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

[44] Even if the grounds of the succeeding sessions court judge is lacking or there was an error on her part for stating that she will only consider the defence, the High Court judge had meticulously examined the evidence of the prosecution for each instance of the cheating. There were three instances of cheating in this case. The first relates to the cashier's order in the value of S$3.45m, the second and the third instances were in relation to the sum of RM2m cash and RM1.3m cash respectively.

[45] In this regard, it was submitted by Mr Gobind that it is wrong for the High Court judge to look at the evidence as if he was a trial judge. We are not able to agree with learned counsel. In our view, there cannot be a disparity in the powers of an appellate court at different levels in dealing with any error, misdirection or irregularity. Furthermore, an appeal is merely a continuation of proceedings by way of rehearing and where circumstances warrant, the appeal court may review and reevaluate the evidence and come to its own findings of fact (see *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800).

[46] We do not wish to reproduce the findings of the High Court judge, suffice to state that we agree with the findings and the reasons given by the High Court judge in his analysis of the evidence. The High Court judge has considered the elements of the offence and has looked at all the evidence in making his findings that both the sessions court judges were correct in calling for the defence and that the defence has failed to raise a reasonable doubt on the prosecution case, respectively. We also agree with the High Court judge on the issue of common intention.

Fifth issue: Common intention

[47] In the celebrated case of *Mahbub Shah v Emperor* [1945] 46 Cr LJ 689, two important observations were made in respect of the application of s 34 of the Penal Code . Firstly, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all. If this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act was done by him alone. Secondly, the inference of common intention within the meaning of s 34 should never be reached unless it is a necessary inference deducible from the circumstance of the case.

[48] In this appeal, there is clear involvement of all the appellants in the whole transaction where the role of the each of the appellants had been analysed by the High Court judge. There is direct evidence against the first and the second appellants, in particular in the meeting at Hotel Hyatt in Johor Bahru where the cashier's order was given by SP1. Both the first and the second appellants went to Sibu, where the flight tickets were purchased by the first appellant and both were present at Hotel Tanahmas in Sibu where the second appellant brought the purported letter of approval to SP1, which resulted in the payment of RM2m cash to the second appellant. This payment was collected by the wife of the third appellant. There is also clear evidence that the first appellant informed SP1 that the second appellant was the private secretary to the Menteri Besar of Johor and that the second appellant introduced himself as the private secretary to the Menteri Besar of Johor. SP1 stood firm in cross

examination on the above said evidence. In our view, it can reasonably be inferred that the presence and the conduct of the first appellant was in concert pursuant to the prearranged plan to deceive SP1.

[49] The role of the second appellant was undeniably clearer. He was the one who brought the file containing the purported EXCO approval for the application of the said land and he had shown the purported minutes of the EXCO meeting, to SP1. It was the second appellant who took the cashier's order of S$3.45m from SP1, allegedly to be passed to the Menteri Besar of Johor. It was also the second appellant who told SP1 that the lease of the said land could be extended from 99 years to 999 years. And it was the second appellant who had represented to SP1 on the various payments to be made in relation to the application for the said land. In short, the second appellant was directly involved in getting SP1 to part with the monies forming the subject matter of the charges against him.

[50] Although the third appellant was not present when the monies were given by SP1 to the second appellant, we are satisfied that the third appellant was part of the plan and privy to the deception on SP1. On the error on the lot number, the first appellant said to SP1 that he needed to wait for his boss Dr Johari (the third appellant) to return from umrah before the error could be corrected. Why the need to even refer the error to the third appellant or to wait for the third appellant if the third appellant is not part of the scheme to deceive SP1.

[51] Further, there was clear evidence from the bank officers, Mariana bt Othman ('SP12') and Zuraini bt Omar (SP24) as to the involvement of the third appellant in the opening of the bank accounts. The involvement of the third appellant's wife in collecting the RM2m cash and the third appellant's conduct in opening the bank accounts and in getting some of the monies, in our view led to an inference that the third appellant was indeed involved in the plan to cheat SP1. In particular, we agree with the finding of the High Court judge that:

> [150] Penjelasan yang munasabah terhadap kehadiran Rosnani bt Abdul Rahman hari itu adalah kerana pakatan yang berlaku hasil dari niat bersama perayu kedua dan perayu ketiga (suami Rosnani bt Abdul Rahman).

[52] The evidence of SP1 and SP2 disclosed that at the meeting where Rosnani bt Abdul Rahman collected the RM2m, she was introduced by the second appellant as the wife of the Menteri Besar of Johor. Rosnani was not called by the prosecution but she was offered to the defence. In our view, the non-calling of Rosnani by the prosecution does not create a gap in the prosecution's case, given that there was no dispute as to her identity. The fact

remains that she had collected the RM2m and the third appellant had a fair share in the distribution of the monies cheated of SP1. The conduct of the third appellant, though subsequent to the deception of SP1 is relevant under s 8 of the Evidence Act 1950 .

[53] In our view, the High Court judge had correctly made inferences from the act or conduct of the appellants in coming to the conclusion that the appellants had the common intention to deceive SP1. We agree with the following findings of the High Court:

> [130] Di antara keterangan-keterangan di dalam kes ini di hadapan mahkamah ini yang menunjukkan niat bersama perayu-perayu adalah seperti berikut:
>
> (a) perayu pertama dalam usaha untuk meyakinkan SP1 dan kawan SP1 mengenai tanah berkenaan sebenarnya milik kerajaan dan permohonan dibuat kepada/melalui Menteri Besar Johor telah cuba meyakinkan bahawa perayu kedua sememangnya Setiausaha Sulit Menteri Besar Johor.
>
> (b) untuk tujuan itu beliau menjemput perayu kedua di dalam kawasan Pejabat Menteri Besar di Bukit Timbalan (rujuk muka surat 401–402 dalam Rekod Rayuan). Keadaan ketika menjemput perayu kedua menunjukkan perayu pertama memang telah membuat perancangan untuk menjemput perayu kedua di sana.
>
> (c) fakta perayu kedua dilihat datang dari arah Pejabat di Bukit Timbalan itu dengan pakaiannya berkot, bertali leher dan briefcase (rujuk muka surat 401–402 dalam Rekod Rayuan) jelas menunjukkan perayu kedua juga telah tahu perayu pertama akan datang menjemputnya sekitar waktu itu dan telah bersedia dengan penampilan yang meyakinkan.
>
> (d) fakta bahawa perayu pertama tanpa sebab tertentu membawa SP4 untuk menjemput perayu kedua juga jelas menunjukkan rancangan diatur sebegitu rupa untuk meyakinkan bahawa perayu kedua sememangnya Setiausaha Sulit Menteri Besar Johor seperti yang didakwanya kemudian dihotel setelah diperkenalkan kepada SP1 (rujuk muka surat 119 dalam Rekod Rayuan).
>
> (e) kesediaan perayu pertama menunggu dan berlegar dengan kereta dalam kawasan Bukit Timbalan tanpa cuba mendapat perayu kedua di pejabatnya adalah langkah untuk mengelakkan identiti sebenar perayu kedua diketahui (rujuk muka surat 401–402 dalam Rekod Rayuan).
>
> (f) perayu pertama sendiri tahu bahawa perayu kedua bukan Setiausaha Sulit Menteri Besar Johor. Itulah juga sebabnya bila SP2 mengajaknya mencari perayu kedua di Pejabat Menteri Besar bila SP1 menyedari kesilapan pada nombor lot tanah yang diluluskan beliau dengan memberi alasan perayu kedua seorang yang sibuk dan jarang berada di Pejabat (rujuk muka surat 276 Rekod Rayuan). Ini menunjukkan dengan jelas pengetahuan salah dan niat jahat kedua-dua perayu pertama dan perayu kedua.
>
> (g) wujudnya rancangan/niat bersama ini dikuatkan lagi dengan adanya permohonan yang dibuat oleh SP1 iaitu surat permohonan tanah

bertarikh 3 Julai 1995 (eksh P3) dalam beg/fail yang dibawa perayu kedua pada 25 Julai 1995 di Hyatt Hotel (rujuk muka surat 120 Rekod Rayuan).

Sixth issue: Section 112 statement of Raizul (exh P97)

[54] Raizul was the person who had disguised as Menteri Besar, Abdul Ghani bin Othman. His statement was recorded by the police under s 112 of the CPC where he had revealed the events surrounding the opening of the bank accounts in Singapore and Johor Bahru and the involvement of the second and the third appellants in respect of the opening of the accounts. It was submitted that the trial judge fell into error when admitting the statement of Raizul as s 32 of the Evidence Act 1950 had not been complied with.

[55] According to the investigating officer, ASP Chew Kam Soon ('SP30') a subpoena was served on Raizul to attend court and Raizul did attend court once. Due to his failure to attend court on a subsequent date, a warrant of arrest was issued but the warrant could not be executed on him. Raizul could not be traced notwithstanding the following efforts by the police:

(a) the police went to look for him at his address;

(b) an advertisement was put up in the newspapers, namely *Utusan Malaysia*, *Harian Metro*, *Malay Mail* and *Sin Chew Jit Poh*; and

(c) an application was made to the Interpol to trace Raizul in Indonesia.

[56] Mr Gooi contended that all the efforts were done at the eleventh hour whilst in the midst of the trial and that the prosecution had failed to avail itself of the various provisions in the CPC namely ss 47, 49, 118 and 396 on the issuance of warrants and the execution of a bond to ensure the attendance of Raizul in court. Relying on *Public Prosecutor v Lee Jun Ho & Ors* [2011] 6 MLJ 220, Mr Gooi submitted that Raizul is an important witness in this case who can unfold the narratives of the prosecution's case and that the failure of the police to take all reasonable and practicable steps to trace Raizul rendered his statement inadmissible under s 32 of the Evidence Act 1950 .

[57] We find the facts in *Lee Jun Ho*, distinguishable. In *Lee Jun Ho*, there was not a single proactive effort by the police to procure the attendance of a material, relevant and important eye-witness. The court thus found that the police failed to take all reasonable and practicable steps to trace the witness. In our case, there was a search for Raizul at his address, an advertisement in the newspapers and seeking the assistance of the Interpol. These are reasonable efforts taken by the police to trace Raizul. The failure of the police to make use of ss 47, 49, 118 and 396 does not render the statement of Raizul inadmissible. We find that exh P97 was correctly admitted under s 32 of the Evidence Act 1950 .

[58] There was another complaint in respect of exh P97. It was submitted that Raizul was an accomplice and the trial judge had failed to address the law on this point and had thus caused serious miscarriage of justice to the appellants.

[59] Raizul's statement exh P97 disclosed that he had no clue why he had to go to the banks and why the accounts had to be opened. He was merely following the instruction of the third appellant, his 'guru silat'. He had no knowledge that SP1 was deceived. In our view, Raizul is an accessory after a fact. Strictly speaking, an accessory after a fact cannot be an accomplice in the commission of the original offence (see *Kuan Ted Fatt v Public Prosecutor* [1985] 1 MLJ 211). Nevertheless, what remains is whether the statement in exh P97 has been corroborated. We find that the events stated by Raizul therein, in particular, in respect of the role played by the third appellant in opening the accounts, were corrobated by the bank officers, SP12 and SP24. In the circumstances we are of the view that even without the usual corroboration warning, no miscarriage of justice had occasioned to the appellants by the admission of exh P97.

[60] Mr Gooi had further submitted that SP1 knew very well that the monies were corrupt monies paid for political fund. We find this submission to be devoid of any merits. There was no evidence to show that the monies were indeed paid to the political fund of UMNO. What was established by the evidence was that the monies ended up in several bank accounts and distributed among others, the appellants. On the facts, we find this to be a clear case of cheating as the monies were paid by SP1 in consideration of the said land, which SP1 ultimately failed to obtain.

Seventh issue: The credibility of SP17

[61] Mr Prakash raised the point that the prosecution had led two sets of evidence on the receipt of the monies from Hong Kong and Shanghai Bank, Singapore. The evidence of Lim Boey Geok ('SP17') showed that Habil (who is at large) acted as the introducer for her to open the premier current account and premier saving account at Maybank Larkin, Johor Bahru wherein a deposit of RM3m was made. This same amount was withdrawn a week later by way of a cash cheque and the cash, according to SP17, was given to Habil.

[62] The evidence of SP17 therefore implicates Habil as the person who was involved in opening the accounts and who received the RM3m cash. This evidence is at variance with the evidence of the Maybank officers, Lee Choon Leng ('SP16') and Yeow King Siong ('SP19'). SP16 positively identified the third appellant as the introducer to SP17 in opening the premier accounts. SP16 stated that he knew the third appellant because the third appellant's shop

was opposite the bank premises and the third appellant had an account with the bank. SP19 had also identified the third appellant in court as the person who had introduced himself as 'Johari Mansor' and who had collected the RM3m cash and who had put the money in a brief case.

[63] It was thus submitted for the second appellant that there was a contradiction in the prosecution's case as SP17 who had given evidence not favourable to the prosecution was never impeached nor treated as a hostile witness.

[64] In our view, the evidence of SP17 does not affect the prosecution's case. We agree with the following finding of the High Court judge on SP17:

> [179] SP17 adalah saksi berpihak ('bias witness'). SP17 cuba untuk tidak mengaitkan perayu ketiga dan meletakkan kesemuanya kepada Habil. SP17 apabila ditanya mengenai siapa bos Habil menjawab tidak tahu (rujuk muka surat 447 Rekod Rayuan) dan hanya setelah dirujuk eksh D28 barulah mengaku yang Habil adalah pekerja perayu ketiga dan perayu ketiga adalah bos Habil (rujuk muka surat 457 dalam Rekod Rayuan).
>
> [180] SP16 dan SP19 adalah pegawai-pegawai bank yang tidak mempunyai apa-apa kepentingan dan keterangan mereka jelas menunjukkan perayu ketiga yang hadir bersama SP17 dan bukan Habil.

[65] On a maximum evaluation of the evidence led by the prosecution, we are satisfied that the elements of the offence in the charges have been proved. We are of the view that the High Court judge did not err in his finding that the evidence adduced by the prosecution disclosed a prima facie case for the appellants to answer.

[66] Insofar as the defence is concerned, we find that the succeeding sessions court judge had considered the defence as against the evidence of the prosecution in coming to the conclusion that the appellants had failed to raise a reasonable doubt on the prosecution's case.

[67] The succeeding sessions court judge and the High Court judge considered the first appellant's presence and involvement in getting SP1 to prepare the cashier's order, his presence together with the second appellant in Sibu when the purported approval letter was shown to SP1 and his share of the division of the monies where RM1.8m was deposited into his account three days after the cashier's order was given to the second appellant. The first appellant's denial of writing the particulars of Abdul Ghani bin Othman and the identity card number had similarly been considered by the succeeding sessions court judge and the High Court judge. The first appellant's explanation on the RM1.8m credited into his account, purportedly for the

joint venture project with the third appellant had been sufficiently evaluated by both the succeeding sessions court judge and the High Court judge.

[68] As regards the second appellant, the succeeding sessions court judge and the High Court found that the defence was merely a bare denial and that he was trying to protect the third appellant, who was his 'guru silat', his boss and his brother in law. His defence that he introduced himself as the messenger boy or office boy to SP1 was evaluated by the courts below before concluding that the defence was not credible and had not raised a reasonable doubt on the case for the prosecution.

[69] Similarly, the defence of the third appellant had been judicially appreciated by the succeeding sessions court judge and the High Court judge. In particular, the third appellant's denial that he was involved in the opening of the bank accounts with Raizul was considered by the courts below in the light of the evidence of the prosecution witnesses, namely the bank officers who had no interest in this case. Both the courts below found that the defence of the third appellant was a bare denial and had not raised a reasonable doubt on the case for the prosecution.

[70] We agree with the analysis of the defence by the succeeding sessions court judge and the High Court judge and we find not reason to depart from their findings that the defence of the appellants did not raise a reasonable doubt on the prosecution's case. In our view, the necessary inferences drawn from the circumstances, taken cumulatively, are that the appellants are part of and privy to the plan to deceive SP1.

[71] In considering the issues raised by learned counsel for the respective appellants, we had asked ourselves the question whether on the totality of the evidence, the convictions of the appellants are safe. Without doubt, we find that the convictions are safe. We therefore unanimously dismiss all the three appeals against conviction and we affirm the order of the sessions court as upheld by the High Court.

SENTENCES

[72] For the first appellant, Mr Gooi applied for a bound over or if the court is not with him, for a lenient sentence given that it has been 20 years since the offence was committed and considering that the first appellant is 67 years old. For the second appellant who is 62 years old, Mr Prakash similarly prayed for a bound over under s 294 of the CPC. Mr Prakash further submitted that the sentences should be concurrent rather than consecutive. Mr Gobind for the third appellant similarly prayed for the sentences to run concurrently as the offences were part of the same transaction involving the same complainant.

Both Mr Prakash and Mr Gobind echoed the submissions of Mr Gooi on the fact that the offences were committed 20 years ago.

[73] It is an established principle that an appellate court should be slow to disturb the sentence passed by the court below unless the sentence is manifestly wrong in the sense of being illegal or being unsuitable to the proved facts and circumstances (see *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200b; *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83; *Public Prosecutor v Dato' Waad bin Mansor* [2005] 2 MLJ 101).

[74] In these appeals, the succeeding sessions court judge had considered both the public interest and the interest of the appellants and had taken into account the age of the appellants; the fact that the appellants were first offenders; that the offence was a serious offence as it involved big amount of money and that it had implicated the State Government and the Menteri Besar. In deciding on the term of imprisonment, the succeeding sessions court judge had also considered the fact that the victim could not recover the money and that no punishment of whipping could be imposed on the appellants due to their age.

[75] The above factors taken into consideration by the succeeding sessions court judge are relevant factors in imposing sentence. Since it has not been shown that the succeeding sessions court judge had embarked on some extraneous or irrelevant factors in imposing the sentences against the appellants, and having considered the submissions of learned counsel for the respective appellants, we find no reason to disturb the sentences imposed by the succeeding sessions court judge which had been affirmed by the High Court. Further, we are of the view that the sentences are appropriate in the circumstances of the case.

[76] In respect of the second and the third appellants, in determining whether the sentences should be concurrent or consecutive, we are guided by the one transaction rule where four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534). In these appeals, we find that there was no proximity of time and place as the charges relate to different dates and places and different purpose and we find that the aggregate sentences do not offend the totality principle.

[77] The appeals against sentences are thus similarly dismissed.

CONCLUSION

[78] In the upshot, the appeals are dismissed and the convictions and sentences are affirmed.

Appeals dismissed and convictions and sentences affirmed.

Reported by Ashok Kumar